In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE OTIS COMPANY, PLAINTIFF IN ERROR
vs.
THE LUDLOW MANUFACTURING COMPANY AND THE LUDLOW CORDAGE COMPANY. } No. 73.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

STATEMENT OF THE CASE.

This case was begun in the Superior Court for the County of Suffolk, in the Commonwealth of Massachusetts by a petition in equity whereby the plaintiff in error sought to enjoin the defendant, the Ludlow Manufacturing Company, from maintaining a dam erected by it across the Chicopee River, a non-navigable stream, at Red Bridge, so called, in the County of Hampden, and Commonwealth aforesaid, to such a height as will cause a dam and other structures of the plaintiff in error about two miles above upon the same stream to be flooded and injured.

The case was referred to a special Master who found the facts in the case and reported his findings to the Superior Court, whereupon said Superior Court reserved and reported the case and all questions of law therein, including those raised by the objections and exceptions of the parties, for the consideration of the Supreme Judicial Court of said Commonwealth. The case was thereupon argued before said Supreme Judicial Court, and it was ordered by said Court that entry should be made in the Superior Court "Bill dismissed with costs." Such entry having been made, the plaintiff in error brought its petition in this court.

In connection with the erection and maintenance of its said dam, the defendant justifies its proceedings under the Mill Act of said Commonwealth.

The plaintiff contended: that notwithstanding the fact that the defendant first commenced the construction of its dam, the plaintiff, although beginning subsequently, having first completed its dam and put in operation a mill was entitled to the relief prayed for; and that if it should appear that by first commencing the erection of its dam the defendant had acquired the right by reason of priority of occupation to maintain the same under the Mill Act of said Commonwealth, said Mill Act so construed is unconstitutional, and for these reasons it was entitled to the relief which it sought.

The following facts are material:

Prior to October 1898 the defendant had determined to erect a dam (Record p. 38) and prior to August 3, 1899 it had determined upon the present height and site of its dam and on said date first occupied the Red Bridge site within the meaning of Public Statutes of said Commonwealth, c. 190, § 2, and then began the erection of its dam (Record pp. 39, 75).

There was no determination on the part of the plaintiff to build a dam at the site of its present structure until April 4, 1900 (Record p. 40), and the actual construction of its dam was not begun until August 11,1900 (Record pp. 40, 64).

The dam of the plaintiff including its power house is about three hundred fifty-three feet long and nineteen feet high and the cost of its development was two hundred seventy-one thousand dollars ($271,000); while on the other hand the defendant's dam is eight hundred eighty feet long and fifty feet high and the cost of its development was eight hundred thousand dollars ($800,000).

Owing to the much greater magnitude of the defendant's work, the plaintiff was able to and did complete its dam before the defendant completed its dam, and

the plaintiff by its dam raised and used the waters of the stream before any utilization thereof by the defendant by its dam.

The plaintiff conceded (Record p. 40) that the "Ludlow Manufacturing Company commenced both the preliminary, preparatory, and permanent work of building its said dam before the plaintiff began its preliminary, preparatory and permanent work of building its said dam; and the Ludlow Manufacturing Company commenced the work of constructing its said dam before the plaintiff commenced the work of constructing its said dam."

Notwithstanding the fact that the plaintiff knew on April 4, 1900 before any determination on its part to build a dam that the dam in process of erection by the Ludlow Manufacturing Company would cause its own alleged mill site to be flooded, it did not commence this action until the completion of the defendant's dam.

The plaintiff further contended in the State Court that it was entitled to relief because of the provisions of an unrecorded agreement entered into between it and one Metcalf, who at the time of said agreement was the owner of a parcel of land intermediate between the two dams, purporting to restrict and limit the parties thereto in the erection of dams upon their respective lands. A portion of the land of Metcalf to which this agreement related had since been acquired by the Ludlow Cordage Company, and the claim of the plaintiff was that the title of the Ludlow Cordage Company was colorable, that the land in question really belonged to the Ludlow Manufacturing Company and that that Company was bound by the alleged covenants in said agreement.

It should be observed, however, that the Red Bridge dam was not built upon the land conveyed by Metcalf but on other land acquired by the Ludlow Manufacturing Company in 1891, about two miles down the stream from the Metcalf land with intervening land between, and that said Metcalf was not at the date of

said agreement or at any time the owner of the land upon which said Red Bridge dam stands.

The said Court accordingly held that the Red Bridge dam "was erected under the Mill Act by virtue of the defendant's right as a riparian proprietor at the point where the mill site was established," that "the agreement was either a mere personal contract of Metcalf or it was a contract connected with his land which in equity would follow the land in the possession of a subsequent owner who took it with notice," and "if it follows the land, it has no effect upon the rights of the defendant as the owner of other land below."

The alleged mill site of the plaintiff which is involved in this controversy is referred to herein as its "lower privilege," to distinguish it from other mills of the plaintiff, located at Three Rivers, about three quarters of a mile above upon the same stream, which latter mills are, however, not affected by flowage from the defendant's dam at Red Bridge.

As previously stated, said Red Bridge dam is two miles below the plaintiff's so-called lower privilege.

At Ludlow, four miles still further down said Chicopee River, are located extensive mills of the defendant which it has owned and operated for many years.

In the vicinity of its said mills and in connection with and as a part of its development at Red Bridge the defendant has built and put in operation a new mill; and the erection of said dam at Red Bridge and the development there was for the purpose of generating electrical power, to be transmitted to its said new mill and to its said other mills.

Referring to the Master's report, the following rulings and findings made by him should be noted:

Upon the facts found and agreed and the law in the case *the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropri-*

ation by the Otis Company at its so-called lower privilege (Record p. 76).

Upon the law and the facts found and upon the facts agreed to *the Ludlow Manufacturing Company first occupied its mill site as such* (Record p. 76).

Prior to the time the Otis Company commenced the erection of its dam the mill site of the Ludlow Manufacturing Company had been occupied as such by said Ludlow Manufacturing Company (Record p. 76).

The mill dam of the Ludlow Manufacturing Company was begun before any occupancy by the Otis Company of its alleged mill site or so-called lower privilege (Record p. 76).

The Ludlow Manufacturing Company within a reasonable time after the commencement of its said occupation completed and put in operation a mill for the working of which the water of the said Chicopee River was applied (Record p. 76).

Such determination as was made by the plaintiff on April 4 to erect a dam *was for the purpose of preventing the appropriation by the defendant Ludlow Manufacturing Company* under its prior determination and did not comprehend the dam subsequently erected by the plaintiff (Record p. 73).

No determination of the plaintiff on April 4 to erect a dam was arrived at until after notice to it of the Ludlow Manufacturing Company's determination to erect a dam which would cause the plaintiff's dam and alleged mill site to be flooded to substantially the extent to which the present dam of the Ludlow Manufacturing Company is capable (Record p. 73).

The date when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within the meaning of P. S., c. 190, was August 3, 1899 (Record p. 75).

The date when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within

the meaning of said statute after its determination to build a dam high enough to flood the plaintiff's land and injure its lower mill site was August 3, 1899 (Record p. 75).

The first act of occupation of the Red Bridge site by the Ludlow Manufacturing Company within the meaning of said statute after it had determined upon the height of the Red Bridge dam was the excavation of the tail race which began on August 3, 1899 (Record p. 75).

Nothing contained in the so-called Metcalf agreement prohibited the Ludlow Manufacturing Company from erecting and maintaining its present dam and the flowage occasioned thereby (Record p. 75).

September 23, 1904, the plaintiff, the said Otis Company, filed in the Superior Court for the County of Hampden and Commonwealth aforesaid a petition for the recovery of damages under the Mill Act of said Commonwealth (R. L. c. 196, § 4).

This suggestion is not made as the basis for an argument that the plaintiff in error by filing said petition has waived any contention which it is entitled to raise under the record in this case, but merely for the purpose of showing that proceedings for the recovery of compensation in accordance with the Statute of Massachusetts (R. L. c. 196, § 4,) have been begun, and that pending the present controversy the statute of limitations has not run against the plaintiff with respect to such recovery.

Said petition is still pending.

Wherever the word "defendant" is used in this brief the party referred to is the Ludlow Manufacturing Company.

ARGUMENT.

I.

NO FEDERAL QUESTION IS BEFORE THE COURT.

1. The question before the Supreme Judicial Court of Massachusetts was the construction of the statutes of its own State, and it is submitted that no federal question was brought to the attention of the Courts of Massachusetts.

The plaintiff in error brought its bill under the Public Statutes of Massachusetts, c. 190, (now the R. L., c. 196) known as the Mill Act, claiming it was entitled to relief in equity because it completed its dam before the dam of the defendant was completed, and that under sections 1 and 2 of said chapter 190 relief should be given to the proprietor who first completed and put its dam in operation, notwithstanding the defendant first began work upon its dam and proceeded with reasonable despatch in the work of completing it. In other words, the plaintiff claimed that under the Mill Act, the proprietor who first completed its dam was prior in right. On the other hand, the defendant claimed that the proprietor who first began the work of construction was prior in right and entitled to the use of the water.

The real controversy between the parties was upon the construction of sections 1 and 2 of chapter 190 of the Public Statutes. The plaintiff claimed that the statute should be so construed as to give it relief because it finished its dam before the defendant. The defendant claimed that the proper construction of the statute was that the owner who first started was entitled to use its dam although another land owner had previously completed its structure.

The meaning of these two sections of the statute was the real question before the Court, and the Supreme Judicial Court of Massachusetts construed the statute against the construction claimed by the plaintiff and in favor of the construction claimed by the defendant.

The plaintiff in its amended bill (paragraphs 6, 7, 8, 9, Record pp. 25, 26, 27) makes it clear that it sought the construction of the Public Statutes of Massachusetts, (c. 190, §§ 1 and 2) by the Courts of that State. It submitted itself to the jurisdiction of that Court, and in the 9th clause of its bill it says (Record p. 27),

> "If it is the intention and meaning of said statutes hereinbefore recited that a riparian proprietor can, by commencing to occupy his mill site as such or by commencing the work preliminary to the erection of a dam thereon or by commencing to erect such dam, thereby acquire the right to flow out and injure a mill site belonging to an upper riparian proprietor on the same stream and in actual occupation as such, and the water power thereon developed and a water mill thereon completed, in actual use and worked by said water power, then the plaintiff says that said statutes are in violation of the fifth and fourteenth amendments of the Constitution of the United States and of the constitution of Massachusetts.

It is submitted that no federal question was brought to the attention of the Courts of Massachusetts, and the decision of the Courts of that State was purely upon the construction which should be given to its own statutes. In the opinion of the Supreme Judicial Court (Record pp. 113, 114, 115) the Court says as follows:

> "The principal question in the case is, What is the construction of the mill act as applied to these facts? The Pub. Sts. c. 190 § 2, (R. L. c. 196, § 2) is as follows: 'No such dam shall be erected to the injury of a mill lawfully exist-

ing, either above or below it on the same stream, nor to the injury of a mill site on the same stream on which a mill or mill dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill dam be hereafter erected or raised to the injury of any such mill site which has been occupied as such by the owner thereof, if such owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied,' etc.

"The plaintiff contends that the defendant has violated that part of the statute which forbids the erection of a dam to the injury of an existing mill site on which a mill dam has been lawfully erected; and the defendant contends that the erection of the plaintiff's dam was a violation of that part of the statute which forbids the erection of a mill dam to the injury of a mill site which has been occupied by the owner thereof, when the owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied.

"The statute was enacted for the regulation of the rights of property owners upon streams adapted to use for the supply of power. The framers of it recognized the fact that such property, in many cases, could not be used profitably by an owner for a short distance along the stream, without affecting the property of other owners above and below, and preventing a like use of the stream for mill sites on other land. An enforcement by riparian proprietors of their rights at common law would often make it impossible for any of them to use water power effectively. Therefore, their personal interests,

as well as the interests of the public, call for legislation modifying the common law, and regulating the rights of owners of this peculiar kind of property. Our mill act is intended to meet this requirement in a way to promote the development of water power from streams for the benefit of individual owners no less than for that of the general public. Lowell vs. Boston, 111 Mass., 454-464. The framers of the statute foresaw the possibility of a desire of two riparian proprietors owning lands near together on the same stream, each to establish a mill on his own land, when an advantageous use of the water for power would make it impracticable to maintain a mill in more than one of the two places. It was proper to provide for such cases by statute. Accordingly, we have the provision last above quoted. This is, in substance, that as between riparian proprietors so situated, priority of appropriation shall give the better right. The legislature might have established a different rule. If the time of completion of a mill had been adopted as the time which should determine precedence in the right to use the water, there would have been an inducement to owners to engage in a race to see which could first get the water upon his wheel. In different ways the results of such a rule would have been harmful. The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and the actual use of the water within a reasonable time. This is substantially the construction which was put upon St. 1795, c. 74, in the case of Bigelow vs. Newell, 10 Pick., 348, although that statute contained no special provision touching this subject. The Rev. Sts. c. 116, § 2, was in different language from the former act, and contained a prohibition

of the erection of a dam to the injury of any mill site on the same stream. Under this statute the case of Baird vs. Wells, 22 Pick., 312, was decided, in which it was held that the Revised Statutes had changed the law, and that the remedy of one who had begun his mill, but had not finished it until after another mill interfering with his had been completed, was by an assessment of damage under the mill act. Thereupon the Legislature passed the St. 1841, c. 18, which is found in almost identical language in that part of the Pub. Sts., c. 190, § 2, on which the present defendant relies. This enactment restored the rule stated in Bigelow vs. Newell, 10 Pick., 348, which was held to have been changed by the Rev. Sts., c. 116, § 2. Storm vs. Manchaug Company, 13 Allen, 10, 15. That this is the true construction of this statute is further indicated by language used in other cases. *Dean* vs. *Colt*, 99 Mass., 486, 487. *Fitch* vs. *Stevens*, 4 Met., 426, 428. See also Washburn on Easements, 4th Ed., 336, 337. For general discussion of the law, see *Fuller* vs. *Chicopee Manuf. Co.*, 16 Gray, 43. *Fiske* vs. *Framingham Manuf. Co.*, 12 Pick, 68. *Fitch* vs. *Stevens*, 4 Met., 426. *Cary* vs. *Daniels*, 8 Met., 466. *Gould* vs. *Boston Duck Co.*, 13 Gray, 442. *Smith* vs. *Agawam Canal Co.*, 2 Allen, 355, 356.

It is therefore submitted that the question involved in the case was not the validity of the Mill Act, but merely the construction of certain sections of the Act.

> "It is the peculiar province and privilege of the State Courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of un-

constitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Comm. Bank of Cincinnati vs. Buckingham, 5 How., 317, 343.

When the parties have been heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States.

Walker vs. Sauvinet, 92 U. S., 90.

"The appellate jurisdiction of this Court, upon writ of error to a State Court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the State Court to be valid, and not when an act admitted to be valid has been misconstrued by the Court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the State Court was one of construction only, and not of validity. If this Court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest Court of the State has erred in its construction of the statute."

Central Land Co. vs. Laidley, 159 U. S., 103.

"We are not authorized by the Judiciary Act to review the judgments of the State Courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State Court

could be brought here, when the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held."

Knox vs. Exchange Bank, 12 Wall., 379, 383.

The 14th Amendment of the Constitution of the United States is violated, if violated at all, because the Massachusetts statute takes from the plaintiff its property without due process of law. The action of the Court in construing a certain section of the statute did not in any manner raise the question of the validity of the statute or of its constitutionality, but merely decided the meaning of the statute, holding that as between adjoining proprietors of land on the same stream, the one who began first with the erection of his dam was first in right.

To decide that a Federal question was involved in such a proceeding and that the plaintiff was entitled to a rehearing in the Supreme Court of the United States would be to say that a plaintiff could go into a State Court, submitting to that Court's jurisdiction and asking the Court to say that a certain statute meant one thing, and that if it didn't mean the thing contended for by him, then the section so construed was a violation of the 14th Amendment. This, it is submitted, cannot be done, for such a proceeding would oust the State Courts of jurisdiction at the demand of the very party who invoked that jurisdiction.

"The plaintiff below had the benefit of a full and fair trial in the several Courts of her own State, whose jurisdiction was invoked by herself. In those Courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition."

Marchant vs. Penn. R. R. Co., 153 U. S., 380, 386.

A stream of water would be useless for manufacturing purposes, unless there is some law regulating the

use of the water between the various riparian owners. These regulations are State questions, and if the statute under which the rights of the water owners are governed provides a tribunal for the hearing of all questions involved, and provides for the assessment of damages, then there is due process of law as required by the 14th Amendment of the Constitution of the United States. And the regulation of the respective rights of the mill owners under that statute is a local question.

Castillo vs. McConnico, 168 U. S., 674 and cases cited.

2. The validity of the Statute as a whole was not questioned by the plaintiff.

The plaintiff did not contend that the Mill Act was unconstitutional. On the contrary it practically admitted its validity. It sought relief under the Act, it came before the Courts of Massachusetts basing its right to relief upon this Act, and in effect saying that the Act is perfectly valid in all respects, including sections 1 and 2, but if the construction of these sections claimed by the defendant is the correct construction, then these sections, *not the whole statute*, are contrary to the 14th Amendment.

It is submitted that a party plaintiff cannot in this way and manner properly present a Federal question for the determination of the Court. The question raised by such pleading, and the only question thus raised, is the question of the proper construction of a State statute.

If it be assumed that a State statute may be so construed as to deprive one of his property without due process of law, because the State Court decides that under the statute no notice of the taking of his land is necessary, or because it does not give ample damages for the land so taken, and if it be assumed still further that by proper pleadings and procedure the Federal

question is properly brought to the attention of the Court, then the answer to this contention is that no such question was presented to the Courts of Massachusetts, nor was such a question necessary for the decision of the Court in this case.

The question of adequate provisions for damages and notice were questions involved in the Mill Act as a whole, and were not involved merely in sections 1 and 2 of this Act. The whole Act was not before the Court, nor was its construction of the Act as a complete statute asked for by the plaintiff. The statute as a whole deals with the question of damages, and in sections other than the ones above referred to, makes full and adequate provision for their payment. None of these questions were involved in sections 1 and 2. Much less can it be said that these questions, or any constitutional questions, were involved in the construction of these particular sections.

The Court in deciding that as between two riparian proprietors on the same stream, both relying upon the same statute, the proprietor who first begins the work of constructing his dam is first in right, does not in so deciding pass upon any question of damages or notice or any question of due process of law which may arise under the 14th Amendment.

The Court thereby merely decides upon a matter entirely within its jurisdiction, that is, it decides what the statute means, it construes its own laws, and passes on the question, who is entitled to the beneficial use of the waters of the stream, the one who in good faith first starts upon the work of building his dam, or the one who for any reason first completes his work. And it no more raises a constitutional question in deciding in the way it did, than if it decided differently and decided that the proprietor who first completes his dam is prior in right. Could it be claimed that under such a construction, a construction favorable to the plaintiff, the defendant could raise a constitutional question and could come before this Court on a writ of error on

the ground that the decision of the Supreme Judicial Court of Massachusetts violated the 14th Amendment? If the State Court decided in accordance with the plaintiff's contention the plaintiff would not ask for relief from the Federal Court, it would have been content with the statute as construed by the Courts of the State. Can the plaintiff come before this Court because the construction placed upon certain sections of the statute is contrary to its contention?

3. Even if a federal question is involved, the plaintiff has waived it.

By submitting to the jurisdiction of the State Court and seeking a remedy under the Mill Act, the plaintiff deprived itself of the right to question the constitutionality of the statute.

The plaintiff elected to proceed under the statute and by so doing waived its right to contest the constitutionality of the law whose aid it invoked. By proceeding under the particular statute it acquiesced in its validity.

Hale vs. Lewis, 181 U. S., 473.
Electric Co. vs. Dow, 166 U. S., 489.
Eustis vs. Bolles, 150 U. S., 361.
Pitkin vs. Springfield, 112 Mass., 509.
Baker vs. Braman, 6 Hill, 47.
Dewhurst vs. Allegheny, 95 Pa. St., 437.

A party who seeks in the State Court to litigate rights and is given an opportunity to do so, cannot raise a Federal question simply because he is unsuccessful.

Remington Paper Co. vs Watson, 173 U. S., 443.
Cooley on Const. Lim., 6th Ed., p. 214.
Bigelow on Estoppel, p. 689.

The plaintiff by its pleadings took two inconsistent positions before the Courts of Massachusetts, one that the Courts of that State should take jurisdiction

over the action for the purpose of construing certain sections of the statute, and the other that the State Courts were without jurisdiction under the statute, unless they construed these sections in a certain way. And the plaintiff thereby is precluded from raising the question of the violation of the Federal Constitution.

Amy vs. Manning, 144 Mass., 153.

Washburn vs. Gt. West. Ins. Co., 114 Mass., 175.

A plaintiff in a bill in equity cannot rest his claim to relief on inconsistent titles. He cannot at the same time claim relief upon the assumption that a certain law is both valid and invalid. The position of the plaintiff in this case is analogous to the position of a plaintiff who in the same bill in equity asserts a will to be valid in order to claim a benefit thereunder, or invalid in order that he may be also benefited.

Wright vs. Wilkin, 4 D. G. & J., 141.

4. Plaintiff not entitled to relief because of its laches.

The Ludlow Manufacturing Company began the work of building its dam on August 3, 1899 (Record p. 75). The plaintiff brought this bill in equity in October, 1901. For a year and more before the present suit was begun the plaintiff had actual and constructive notice of the work the defendant was engaged in, and made no move to prohibit it, but suffered it to proceed with the work and expend large sums of money thereon (Record pp. 63, 64, 65, 66).

The plaintiff was therefore guilty of laches, and upon this ground the State Courts might have decided adversely to the plaintiff.

> "It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights and thereby inflict loss and damage on parties acting in

> good faith. In such cases a prompt assertion of right is essential to a just claim for relief in equity."
>
> Whitney vs. Union R. Co., 11 Gray, 359, 367.

5. Even if a federal question is involved, it is not properly presented.

Nor was the constitutionality of the Mill Act properly presented to the Courts of Massachusetts. The only suggestions of a conflict between the statute of Massachusetts and the Federal Constitution were contained in the plaintiff's bill, and not only did the plaintiff by its own pleadings place itself in an inconsistent attitude before the State Courts, but its allegations bearing upon this question are argumentative and in the alternative. The pleadings, therefore, did not properly raise any Federal question.

Looking at paragraphs 6, 7, 8 and 9 of the plaintiff's last amended bill (Record pp. 25, 26, 27) it is seen that the plaintiff is arguing against an assumed construction of a portion of the statute and is stating its case in the alternative. And the defendant did not waive this defect; it specifically demurred to this portion of the plaintiff's bill. (See answers of the defendant, Record pp. 28, 29, 30, 31.)

The Supreme Judicial Court might well have placed its decision upon the fact that the demurrer of the defendant should be sustained, and it is submitted that the question of the defect in the plaintiff's pleadings is still open to the defendant.

6. The decision of the Supreme Judicial Court of Massachusetts was not based on any federal question.

It is not sufficient to give this Court jurisdiction that a Federal question may possibly arise. The Federal question must be clearly and certainly involved.

The Federal question must have been decided and it must have been necessary for the decision.

It must appear that the decision of the State Court necessarily rests on the Federal question, for if the decision was also rendered upon some other ground broad enough to support the decision of the State Court, the Supreme Court will not take jurisdiction.

And if in the opinion of the Supreme Court the State Court could have rendered judgment upon grounds not involving a Federal question, then the Supreme Court will not take jurisdiction.

Klinger vs. Missouri, 13 Wall., 257.
Jenkins vs. Loewenthal, 110 U. S., 222.
Chouteau vs. Gibson, 111 U. S., 200.
DeSaussure vs. Gaillard, 127 U. S., 216.
Hammond vs. Johnston, 142 U. S., 73.

The Federal question was not necessary for the decision of this case, and the decision can be maintained upon grounds involving no Federal question. The plaintiff claimed the right to maintain its bill on two grounds. One of these was the so-called Metcalf agreement. (This was an agreement between the plaintiff and one Metcalf, restricting the rights of the parties to that contract upon a certain portion of the Chicopee River. None of the defendants were parties to that contract, however, and it did not purport to impose any restrictions upon the use of that part of the Chicopee River upon which the defendant built its dam.) On this part of the case the Supreme Judicial Court of Massachusetts decided that the rights of the defendants were not affected by the Metcalf agreement. There was clearly no Federal question involved in this part of the decision. The only other ground upon which the plaintiff claimed the right to maintain its bill was that the Mill Act should be construed in a certain way, giving it a right because of prior completion, but on this question the decision of the Court was that the construction claimed by the plaintiff was not correct. Up to this point no Federal question was

involved, and none was necessary for the decision of the case; and the case was decided upon these two points. These points fully settled the rights of the parties upon the stream, and no Federal question was raised by the plaintiff's suggestion that a construction contrary to that claimed by it, would be unconstitutional.

Giles vs. Teasley, 193 U. S., 146.
Pierce vs. Somerset Ry., 171 U. S., 641.
O'Neil vs. Vermont, 144 U. S., 323.
Rutland R. R. vs. Cent. Vt. R. R. Co., 159 U. S., 630.
Beaupre vs. Noyes, 138 U. S., 397.
Hale vs. Lewis, 181 U. S., 473.
Tennessee vs. U. & P. Bank, 152 U. S., 454.
Johnson vs. Risk, 137 U. S., 300.
Klinger vs. Missouri, 13 Wall., 257.

"It is settled law that, to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. It is likewise settled law, that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

Eustis vs. Bolles, 150 U. S., 361.

See also

Cook County vs. Calumet etc. Dock Co., 138 U. S., 635.

Sawyer vs. Concordia, 12 Fed., Rep., 754.

Pac. Gas Imp. Co. vs. Ellert, 64 Fed. Rep., 421.

"It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which could be, independent of the Federal ones, determinative of the controversy. Assuming, therefore, that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant * * *."

McKenna, J., in Harrison vs. Morton, 171 U. S., 38.

And jurisdiction is not conferred upon the Federal Courts by a statement that plaintiff intends to rely upon a statute of the State and that the statute construed in a certain way violates the Federal Constitution.

Boston Mining Co. vs. Montana Ore Co., 188 U. S., 632, 639.

Tennessee vs. U. & P. Bank, 152 U. S., 454.

Arkansas vs. K. & T. Coal Co., 183 U. S., 185.

Mut. Life Ins. Co. vs. McGrew, 188 U. S., 291, 310.

And if we assume that the Supreme Judicial Court of Massachusetts passed upon the Federal question and decided it adversely to the plaintiff, this does not change the rule, if the Federal question was unnecessary for the decision.

Harrison vs. Morton, 171 U. S., 38.

Eustis vs. Bolles, 150 U. S., 361.

N. P. R. R. Co. vs. Ellis, 144 U. S., 458.

Rector vs. Ashley, 6 Wall., 142.

Wood M. & R. M. Co. vs. Skinner, 139 U. S. 293.

Kennebec R. R. vs. Portland R. R., 14 Wall., 23.

Cal. Powder Works vs. Davis, 151 U. S., 389.
Gibson vs. Chouteau, 8 Wall., 314.
Miss. Pac. Ry. vs. Fitzgerald, 160 U. S., 556.
Seneca Nation vs. Christy, 162 U. S., 283.

But it is further submitted that the Court did not pass upon any Federal question. The only question of this kind which the Court even mentioned was the question of damages, and this question did not arise in the present case, and the Court so stated in its opinion. "It is unnecessary to determine, in this case, what constitutional rights one has in the question of damages." (See Opinion, Record p. 116.)

The Court was here considering the question of the supposed conflict of the statute with the Massachusetts Constitution, and made no reference to any conflict between the statute and the Constitution of the United States.

See Miller vs. Cornwall R. R. Co., 168 U. S., 131.
Kipley vs. Illinois, 170 U. S., 182.

And on this question as before stated the plaintiff has already commenced in the Superior Court for Hampden County, in the Commonwealth of Massachusetts, under the identical statute which is now claimed to be unconstitutional, proceedings to recover damages as provided in said statute.

The petition of the plaintiff to recover damages for the injury done to its property by the defendant is brought under § 4 of chapter 196 of the Revised Laws of Massachusetts, and that section provides that the owner of land flowed or otherwise injured by a dam erected under the statute, may obtain compensation therefor. And in this proceeding the question of the amount of the plaintiff's damages will be before the Court for decision, and the question of its damages does not arise in the case now before the Court.

It is therefore submitted that the Court did not decide this case on any Federal question; that the rights of the parties were settled without reference to any

such question, and the decision of the Court can be supported upon the two grounds, namely, the effect of the Metcalf agreement, and the rights of riparian owners under §§ 1 and 2 of the statute.

7. The plaintiff raised merely a moot question.

The Supreme Court of the United States will not assume jurisdiction of this case if the plaintiff raises only a moot question. The plaintiff asks for a decision upon the constitutionality of a certain statute, upon which statute it relies for relief, and a decision in the plaintiff's favor will not be decisive of the rights of the parties or confer any benefit upon the plaintiff.

The plaintiff seeks the protection of the Courts under the Mill Act of Massachusetts, which Act, it says, as construed by the Courts of Massachusetts, is unconstitutional. If the Mill Act is unconstitutional, it is so because the State Courts have construed it in a certain way, and no other construction can be placed upon the statute except the construction given to it by the Courts of its State. If the plaintiff is correct in its contention, then the Mill Act is unconstitutional, and it follows that from this decision it is entitled to, and can receive, no benefit in this suit. For if the statute is invalid, because contrary to the Federal Constitution, the plaintiff no more than the defendant is entitled to any relief under it; it is as void for one party as the other. It is an unconstitutional law under which neither party can establish a right, and nothing but an abstract proposition therefore is before this Court for decision. The plaintiff stands no better than the defendant if the statute is void, and no relief can be given to it if it obtains a favorable decision.

Castillo vs. McConnico, 168 U. S., 674.
Kimball vs. Kimball, 174 U. S., 158.

If the plaintiff rests its claim upon anything contained in the pleadings apart from the statute, which statute it claims to be contrary to the 14th Amendment

of the Constitution, then the question may be asked upon what claim does it rest its right to recover. Upon the allegations in the bill relating to the Metcalf agreement? If upon this ground, the answer is, the question involved therein was whether this so-called Metcalf agreement ran with the land or was a purely personal agreement. And the State Court has said it was a personal and not a real covenant. This was entirely a local and not a Federal question, and upon this question the rights of the parties are permanently settled by the decision of the State Court. This is really the only common law question raised by the pleadings. No other question, apart from the question under the statute, was involved in the proceedings.

But if it can be said that another common law question was before the Court for decision and properly raised by the pleadings, that question, considered in the light most favorable to the plaintiff, was a question of the reasonable use of the stream.

This question, if it arises at all, comes up under the fifth paragraph of the plaintiff's bill, which paragraph is based solely upon the Metcalf agreement; and this agreement, we have seen, was construed against the contention of the plaintiff.

But if it may be thought that the plaintiff fairly presented to the State Court the question of the reasonable use of the stream as between itself and the defendant, aside from the Metcalf agreement, then the decision of the State Court would be conclusive and controlling upon plaintiff and defendant as a common law question, a matter upon which this Court would not take jurisdiction.

In other words, if the plaintiff succeeds in its contention, it is entitled to no relief either in this Court or in the Courts of Massachusetts. And therefore, it is submitted, for the reasons given above, the plaintiff presents no Federal question for the decision of the Supreme Court, and its writ of error should be dismissed.

II.

THE CONSTITUTIONAL QUESTION.

The Mill Acts of Massachusetts, Public Statutes, chapter 190 (Revised Laws, chapter 196), are in accord with the Constitution of that Commonwealth.

In most of the cases in that jurisdiction, the validity of the Mill Acts has been assumed by the highest court of the State for more than one hundred years without dispute.

Manufacturing Co. vs. Upham, 5 Pick., 292.
Bigelow et al. vs. Newell, 10 Pick., 348.
Palmer Co. vs. Ferrill, 17 Pick., 58, 65.
Baird vs. Wells, 22 Pick., 312.
Storm vs. Manchaug Co. et al., 13 Allen, 10.
Fiske vs. Framingham Mfg. Co., 12 Pick., 68.
Fitch vs. Stevens, 4 Met., 426.
Brigham vs. Wheeler, 12 Allen, 89.
Lowell vs. Boston, 111 Mass., 454, 466, 467.
Washburn's Easements, (4th Ed.) 336, 337.
Cary vs. Daniels, 8 Met., 466.
Gould vs. Boston Duck Co., 13 Gray, 442.

There are also many other decisions of the same Court that might be cited in this connection.

In cases where the question has been directly raised, the validity of the statutes known as the "Mill Acts" has been by the same court sustained and they have been declared constitutional.

Murdock vs. Stickney, 8 Cush., 113.
Hazen vs. Essex Company, 12 Cush., 475.
Lowell vs. Boston, 111 Mass., 454.
Turner vs. Nye, 154 Mass., 579.
Otis Company vs. Ludlow Mfg. Co. et al., 186 Mass., 89, 95.

This being the construction of these statutes by the highest court of the State, such construction is conclu-

sive on the Federal Supreme Court on a writ of error to the State Court.

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
Noble vs. Mitchell, 164 U. S., 367.
Carstairs vs. Cochran, 193 U. S., 11.
Walker vs. Sauvinet, 92 U. S., 90.
Merchants' & Mfrs. Natl. Bank vs. Pennsylvania, 167 U. S., 461.
Rasmussen vs. Idaho, 181 U. S., 198, 200.
Morley vs. Lake Shore & Michigan Southern R. R., 146 U. S., 162.

In Fallbrook Irrigation District vs. Bradley, *supra*, Mr. Justice Peckham in the course of his opinion takes occasion to say:

> "We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we were deciding principles of general constitutional law. If the *act* violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it; but if it do not, then there is no justification for the Federal Courts to run counter to the decisions of the highest state court upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."
>
> Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, 155.

In Morley vs. Lake Shore & M. S. R. R., 146 U. S., 162, Mr. Justice Shiras delivered the opinion in which he quotes the language of Mr. Justice Field in the opinion delivered by him in the case of Louisiana vs. Pilsbury, 105 U. S., 278, 294.

"'Whether such a construction (by judicial decisions upon a clause of a state constitution) was a sound one, is not an open question * *. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. * * * * * 'The rule of construction adopted by the highest court of the State, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court.' * * * * * The meaning of a state statute declared by the highest court of a State, is conclusive upon this court. Randall vs. Brigham, 74 U. S., (7 Wall.) 523, 541. If, then, the law as enacted by the legislature, and construed by the state judiciary, will be the law of the state, it follows that, as to the proper construction of the statute and as to what should be regarded as among its terms, no Federal question could arise. The most that could be claimed would be that, although the statute of the state was unobjectionable, yet the state court had erroneously construed it."

Morley vs. Lake Shore & M. S. R. R., 146 U. S., 162.

A.

The Mill Act of Massachusetts, Public Statutes, chapter 190 (Revised Laws, chapter 196), is not in violation of the 14th Amendment of the Constitution of the United States.

The plaintiff assigns twenty-one errors, which resolve themselves into and present for decision but a single question. That question is whether it has been

deprived of its property without due process of law contrary to the provision of this 14th Amendment.

In a majority of the states of the Union, Mill Acts exist, similar in their nature and provisions to the one now under consideration. Many of them have been in force for a long series of years. Several of them were fashioned after the Massachusetts Mill Act.

In most of those states their validity has either been unquestioned or has been determined in the affirmative. In the two or three instances where they have been adjudged invalid, such adjudication has been upon the ground of incompatibility with the constitution of the particular state.

Annexed to the opinion in Head vs. Amoskeag Mfg. Co., 113 U. S., 9, is a list of states in which Mill Acts were in force up to the year 1884.

Moreover, in many of the western states there are Aqueduct, Irrigation and Ditching statutes of like nature and enacted for analogous purposes and receiving similar construction which have been upheld by not only the highest courts of the respective states but also by this Court.

The Mill Acts of Massachusetts with little change in phraseology have been in existence since the Provincial Laws, 12 Anne, c. 8. *Acts and Resolves of the Province of Massachusetts Bay, Vol. 1, p. 729.*

B.

History of the So-Called Mill Acts.

It may not be amiss to call attention to the material provisions of the Mill Acts of Massachusetts up to and including Public Statutes, chapter 190, which latter constituted a portion of the law of the Commonwealth when the plaintiff in error instituted its bill in equity against these defendants.

The Provincial Laws, 12 Anne, c. 8, provided that:

"Whereas it hath been found by experience that, when some persons in this province have been at great cost and expence, for building of mills serviceable for the *publick good*, and benefit of the town, or considerable neighbourhood, in or near to which they have been erected, that, in raising a suitable head of water for that service, it hath sometimes so hapned that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mill or mills, whereby several controversies and lawsuits have arisen; for prevention whereof for the future,—

"Be it therefore enacted by His Excellency the Governour, Council and Representatives in General Court assembled, and by the authority of the same,

"Sec. 1. That where any person or persons have already, or shall hereafter, set up any water mill or mills, upon his or their own lands, or with the consent of the proprietors of such lands, legally obtained, whereupon such mill or mills is or shall be erected or built, that then such owner or owners shall have free liberty to continue and improve such pond, for their best advantage, without molestation.

"Sec. 2. And if any person or persons find themselves agrieved and damnified in their propriety of lands, by its being flowed by the owner or occupant of such mill(s) stopping or raising the water, that, in every such case, the party so damnified in his propriety, (*upon*) (making) application for relief to the court of general sessions of the peace in the county where such mills or pond is, the said court be and hereby are impowered to issue out a warrant, directed to the sheriff of the same county, to summon and impannel a jury of good and law-

ful men, at the proper cost and charge of the owner or owners of such mill or mills; and the jury shall be sworn by a justice of (*the*) peace, to a faithful, indifferent apprisal of the yearly damage done to (*the*) (any) person complainant, by flowing his or their land as aforesaid."

Acts and Resolves of the Province of Massachusetts Bay, Vol. 1, p. 729.

The Act of 1795, chapter 74, so far as material, is as follows:

"Whereas the erection and support of mills to accommodate the inhabitants of the several parts of the state ought not to be discouraged by many doubts and disputes; and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors—therefore

"Sec. 1. Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, that where any person hath already erected, or shall erect any water mill on his own land, or on the land of any other person by his consent legally obtained, and to the working of such mill, it shall be found necessary to raise a suitable head of water, and in so doing any lands shall be flowed not belonging to the owner of such mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage in the manner and on the terms hereinafter mentioned.

"Sec. 2. And be it further enacted, that if any person shall sustain damages in his lands by their being flowed as aforesaid, he may complain to the Court of Common Pleas of the county wherein the land so flowed shall be situated, and the said Court shall issue a warrant to the sheriff of the same county; and if the sheriff shall be interested, then to some coroner of the

same county not interested, such sheriff or coroner to be named by the Court, directing him to summon and empannel a jury of twelve good and lawful men; which jury shall be sworn to make a true and faithful appraisement of the yearly damages done to the complainant by so flowing his lands, and how far the same may be necessary. And said jury shall try the cause; and their verdict being returned by the officer to the same court and there allowed and recorded shall be a sufficient bar to any action to be brought for any such damages. And it shall be in the power of said court to assess such sum to the officer for his services as they may judge reasonable."

The Act of 1824, chapter 153, first made the owner of a dam erected under the Mill Acts liable for flowing lands *below* his dam and for the retention of water above it.

In 1836 the Revised Statutes were enacted, the material parts of which are the following sections of chapter 116:

"Section 1. Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream, that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

"Sec. 2. No such dam shall be erected, to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill site on the same stream, on which a mill or mill dam shall have been lawfully erected and used, unless the right to maintain a mill, on such last mentioned site, shall have been lost or defeated, by abandonment, or otherwise; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance or authority from the owner, as would be necessary

by the common law, if no provision relating to mills had been made by statute."

The Act of 1841, chapter 18, provides as follows.

"Sec. 1. No mill dam shall hereafter be erected or raised to the injury of any mill site on the same stream, which shall have been occupied as such by the owner thereof, provided such owner shall, within a reasonable time after commencing such occupation, complete and put in operation a mill, for the working of which the water of such stream shall be applied.

"Sec. 2. So much of the second section of the one hundred and sixteenth chapter of the Revised Statutes as is inconsistent with the provisions of this act, is hereby repealed."

General Statutes, chapter 149, contains the laws upon this subject in force in 1860. The sections of the chapter material to this controversy are as follows:

"Section 1. Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

"Sec. 2. No such dam shall be erected to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill-site on the same stream, on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall any mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof: *provided*, that such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream shall be

applied; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance, or authority, from the owner, as would be necessary by the common law if no provision relating to mills had been made by statute."

The material provisions of Public Statutes, chapter 190, are as follows:

"Section 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed.

"Sec. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute.

"Sec. 3. The height to which the water may be raised, and the length of time, or period, for which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury.

"Sec. 4. A person, whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint be-

fore the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint.

"Sec. 5. The complaint shall contain such description of the land alleged to be flowed or injured, and such statement of the damage, that the record of the case will show with sufficient certainty the matter heard and determined therein.

"Sec. 6. The complaint may be filed in the court in term time, or in the clerk's office in vacation, and in either case notice thereof shall be given to the owner or occupant of the mill by delivering to him, or leaving at his dwelling-house, an attested copy of the complaint; or if he is not found within the commonwealth, and has no dwelling-house therein, by leaving such copy at the mill in question fourteen days at least before the complaint is to be heard; or the complainant may, fourteen days at least before the sitting of the court to which his complaint is brought, cause the owner or occupant of such mill or dam to be served with an attested copy of the complaint by delivering or leaving such copy in like manner as when the complaint is filed as aforesaid.

"Sec. 7. The notice shall be served by an officer authorized to serve other civil processes between the same parties.

"Sec. 8. The respondent may answer in bar that the complainant has no estate or interest in the land alleged to be flowed or injured, that the respondent has a right to maintain his dam for an agreed price or without any compensation, or any other matter which may show that the complainant cannot maintain the suit; but

the respondent shall not answer that the land described is not injured by the dam.

"Sec. 9. If a plea or answer is filed by the respondent, the replication and other pleadings, and the trial of the issue, whether of law or of fact, shall be conducted in like manner as in actions at common law.

* * * * * *

"Sec. 11. If the owner or occupant of the mill or dam, after due notice, is defaulted or offers no legal objection, or if an issue is decided in favor of the complainant, the court shall issue a warrant for a jury to hear and determine the matter of the complaint.

"Sec. 12. Such warrant shall be directed and served, and the jurors shall be drawn, summoned, and returned, in the manner provided in chapter forty-nine with respect to a jury returned on the complaint of a person aggrieved by the laying out of a highway, and the jurors shall be required to attend under a like penalty, and the proceedings for supplying a deficiency of jurors and all other proceedings in the case shall be substantially the same as are provided in said chapter.

"Sec. 13. If the parties so agree by writing filed in the case, the trial may be had before a jury in the superior court as in other civil actions, and in such case, if either party requires it, the jury shall view the premises alleged to be injured, subject to such regulations and terms as the court may prescribe.

"Sec. 14. The jury, in estimating the damage to the land of the complainant, shall take into consideration any damage occasioned by the dam to his other land, as well as the damage occasioned thereby to the land overflowed; and they shall also allow by way of set-off any bene-

fit occasioned by such dam to the complainant in relation to his lands.

* * * * * *

"Sec. 16. If they find that the complainant is entitled to recover damages, they shall assess the amount of damages sustained within three years next preceding the institution of the complaint and to the time of the rendering of the verdict, and, if the verdict is allowed and recorded, the complainant shall have judgment and execution for the amount of damages so assessed.

"Sec. 17. If it is alleged in the complaint that the dam is raised to an unreasonable height, or that it ought not to be kept up and closed during the whole year, the jury shall decide how much, if any, the dam shall be lowered, and also whether it shall be left open during any part of the year, and, if so, during what part, and shall state such decision as a part of their verdict.

"Sec. 18. They shall also ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid.

"Sec. 19. The complainant may in such case, at any time within three months after the verdict is allowed and recorded, elect to take the sum so awarded in gross for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he makes such election, he shall within said three

months cause the same to be entered on the record of the case in the clerk's office.

"Sec. 20. The owner or occupant of the mill or dam shall, within three months after such election is thus entered, pay to the complainant, or secure to his satisfaction, said sum with interest from the time of the verdict. After the expiration of said three months, and until payment of said damages and interest, such owner or occupant shall lose all benefit of the provisions contained in this chapter.

"Sec. 21. If the complainant does not within said three months cause such entry of his election to be made on the record, he and all persons claiming under him shall, so long as the dam is kept up and maintained, be entitled to demand and receive from the owner or occupant of the mill the annual compensation so established by the jury, unless the sum is increased or diminished upon a new complaint as hereinafter provided.

"Sec. 22. The person entitled to receive said annual compensation or gross damages shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and on the land under and adjoining the same and used therewith; but such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

"Sec. 23. Such person may maintain an action of contract therefor in the superior court against the person who owns or occupies the mill when the action is brought, and shall in such action recover the whole sum due and unpaid for the three years then last passed, whoever has owned or occupied the mill during that time; and he shall be entitled to full cost, although the sum recovered does not amount to twenty dollars.

"Sec. 24. The execution issued on such judgment may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell such premises, or so much thereof as is necessary to satisfy the execution and all charges of levying it. The officer shall proceed in making the sale in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate mortgaged, and the sale shall be valid and effectual against all persons claiming the premises by any title that has accrued within the time covered by the lien.

* * * * * *

"Sec. 26. The court to which a verdict upon a complaint for flowing land is returned may set it aside for any sufficient cause, and may grant a new trial to be had upon a new warrant or otherwise as the case may require.

"Sec. 27. The party prevailing upon such a complaint shall be entitled to his full costs, except where it is otherwise expressly provided. The court shall award a reasonable compensation to the person who presides at the trial, when it is had before a sheriff's jury, and to the officer who executes the warrant, and the amount so awarded shall, with the pay of the jurors and other like charges, be advanced by the complainant, and taxed and allowed in the bill of costs.

"Sec. 28. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using of a mill or mill-dam, except as is provided in this chapter.

"Sec. 29. The provisions of this chapter shall not, except as is herein expressly provided, affect the right to keep up, maintain, and use any water-mill and mill-dam now lawfully existing; but when the owner or occupant of a mill or dam

makes any material change by raising the dam or by altering the machinery or the manner of using the water, so as to cause additional damage to the land of another, it shall be considered as a new mill or dam, in respect to such additional damage, and the remedy and proceedings to recover compensation therefor shall be substantially such as are provided in this chapter respecting a new dam.

"Sec. 30. When either party is dissatisfied with the annual compensation established by a jury, either under the provisions of this chapter or under the laws heretofore in force, a new complaint may be brought for the increase or diminution of such compensation, or for ascertaining the gross amount of the damages, and all the proceedings shall be conducted substantially in the manner before provided in the case of an original complaint; but when a complainant has declined to accept gross damages which have been awarded to him, no jury shall again determine the amount of gross damages until the expiration of ten years thereafter.

"Sec. 31. Such new complaint may be maintained by and against either of the parties to the original suit, or by and against a person lawfully holding under either of them, but no such complaint shall be brought until the expiration of one month after the payment of the then last year has fallen due.

* * * * * *

"Sec. 36. If upon a complaint by the owner of the land the jury decide that he is not entitled to any annual compensation, the judgment thereon shall be no bar to a new complaint for damages alleged to have arisen after the former verdict and for compensation for damages thereafter sustained.

* * * * * *

"Sec. 39. Two or more persons suffering damage from a mill-dam, whether jointly or separately interested in the lands injured, may join in a complaint under this chapter; and their cases may be heard before the same jury, which may assess joint or several damages as the interest and title of the complainants may require; and judgment and execution for damages and costs shall be had in conformity thereto.

* * * * * *

"Sec. 41. If a complaint is abated or otherwise defeated for any matter of form, or if after verdict for the complainant the judgment is reversed for error, upon a certiorari or otherwise, the complainant, or any person claiming from, by, or under him, may bring a new complaint for the same cause at any time within one year after the abatement or other determination of the original complaint or after the reversal of the judgment, and may upon the new complaint recover all damages sustained during the three years before or at any time after the institution of the first complaint.

* * * * * *

"Sec. 52. No reservoir, reservoir-dam, or mill-dam shall be constructed or materially altered, until plans and specifications of the proposed work have been filed with and approved by the county commissioners of the county where it is to be done. Said commissioners shall retain and record such plans and specifications, and shall inspect the work during its progress; and if at any time it appears that the plans and specifications are not faithfully adhered to, they may appoint an inspector, to be constantly engaged at the expense of the owners in the supervision of the work; and upon a refusal of the owners or of their agents to adhere to said plans

and specifications, said inspector may order the discontinuance of the work; *provided*, however, that nothing contained in this and the six following sections shall apply to small dams, constructed for irrigation or for other purposes, the breaking of which would involve no risk to life or property."

(In paragraph 8 of plaintiff's Amended Bill of Complaint (Record p. 26), an attempt was made to recite sections one and two of the Statute, but such recitation is omissive and incorrect.)

C.

Reason for and object of the "Mill Acts."

They were enacted to induce and enhance the wealth and prosperity of the Commonwealth, for the public welfare, for the resulting general good, for the promotion of and increase of industries and manufactures, for the development of the resources of the State, and incidentally for the discouragement of controversies between riparian proprietors and for the regulation of the rights of property owners upon streams adaptable for power purposes, in a manner best calculated on the whole to promote and secure their common rights in it.

It is by virtue of this legislation that Massachusetts has attained her success and ascendency in the industrial world. It is also true that similar statutes in the other New England States were and are the proximate causes of their advancement and thrift.

Under chapter 74 of the Acts of 1795, Mass. Statutes, there arose the case of *Bigelow et al. vs. Newell* (1830) reported in the 10th of Pickering, 348, in which the Court held, in an opinion by Shaw, C. J.:

> * * * "that when the upper proprietor has actually built or is building a mill thereon, [*i. e. on the same stream*] a lower proprietor cannot,

> without a right acquired by grant, prescription or actual use, erect a new dam or raise an old one, so as to destroy the upper mill privilege."
>
> Bigelow et al. vs. Newell, 10 Pick., 348, 356.

Subsequently the Revised Statutes were enacted, under which the case of *Baird vs. Wells*, 22 Pick., 312, was decided, wherein it was held that a certain change in the phraseology of the Revised Statutes had changed the law. In this case the plaintiff began the construction of his dam in December, 1836, the defendants in March, 1837. The defendants finished their dam in April, 1837, and the plaintiff, who was the upper proprietor, was prevented from further construction of his dam by the water set back by the dam of the defendants, who were the lower proprietors. Wilde, J., in delivering the opinion of the Court said:

> "The question is, whether the present case is brought within this prohibitory clause of the statute. And it is the opinion of the Court that it is not. At the time defendants' dam was erected the plaintiff had no existing mill. The defendants' dam was erected in April, 1837; and the plaintiff's mill was not completed until the December after. The plaintiff's race-way from the brook to his mill for the purpose of procuring a head of water, was not begun until September or October, of the same year. Nor was the plaintiff's mill site one on which a mill or mill-dam had ever before been erected and used. So that the case is not within the true meaning and indeed the express words of the statute. If the plaintiff has any remedy, it is under the Mill Acts, as the jury were instructed. The case of *Bigelow vs. Newell*, 10 Pick., 348, was cited in support of the plaintiff's claim; but as that case was decided before the Revised Statutes, it cannot control the obvious meaning of the second section of the statute."
>
> Baird vs. Wells, 22 Pick., 312, 315.

By this interpretation of the statute, adopted by the Court in Baird vs. Wells, the very objects sought to be attained by Chapter 74 of the Acts of 1795, were defeated. The legislature, therefore, promptly passed Chapter 18 of the Acts of 1841, which restored the rule of law determined in the case of *Bigelow et al. vs. Newell, supra.*

The Court set forth these changes in the statutes, and the final restoration of the earlier rule, in *Storm vs. Manchaug Company et al.*, 13 Allen, 10, as follows:

> "Before the Revised Statutes, if an upper proprietor was building a mill, he was held to have so far appropriated the water privilege that a lower proprietor could not erect a new dam, or raise an old one, to his injury. *Bigelow vs. Newell*, 10 Pick., 348. By a slight and perhaps unintentional change of phraseology introduced into those statutes, it was held that the law was changed; and that nothing but an existing mill could prevent the lower proprietor from putting a mill-dam upon his own land, although the effect of it might be to destroy an upper privilege which its owner had previously begun to occupy. *Baird vs. Wells*, 22 Pick., 312. This was altered, and the old rule restored, by St. 1841, c. 18."
>
> Storm vs. Manchaug Company et al., 13 Allen, 10, 15.

The Act of 1841, c. 18, we find, then, to have been enacted for the purpose of restoring the law as it existed before the Revised Statutes, which, as construed by the Court, had reversed the theretofore established rule, and enacted that nothing but the actual completion of a dam by the owner of one mill site should avail to abridge the rights of the owner or proprietor of another mill site.

The legislature insisted upon returning to the old rule, and did so, unquestionably, because convinced that in practice it was the only workable rule; that a

race between owners of mill sites for the completion of their respective dams would not conduce to the safety of those structures, while it surely would tend to much controversy and litigation; and that the construction of mills and dams would not be encouraged by a policy under which the builder of a dam might find his entire expenditure wasted because another owner of a mill site had managed to complete his dam first.

This purpose of legislation is made doubly plain by the enlargements contained in *General Statutes, Chapter 149, Section 2, and in Public Statutes, Chapter 190, Section 2.*

That the object, purpose and effect of the Mill Acts as they existed at the inception of this controversy are such as herein suggested, see also the following cases:

Fiske vs. Framingham Mfg. Co., 12 Pick., 68.
Fitch vs. Stevens, 4 Met., 426.
Brigham vs. Wheeler, 12 Allen, 89.
Fuller vs. Chicopee Mfg. Co., 16 Gray, 43.
Lowell vs. Boston, 111 Mass., 454, 466, 467.
And the cases therein cited.

D.

The enactment by the Legislature of Massachusetts of Public Statutes, chapter 190, was a legitimate exercise of its authority within the scope of its power to provide for the welfare and prosperity of the people of the State.

Head vs. Amoskeag Mfg. Co., 113 U. S., 9-26.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
Wurts vs. Hoagland, 114 U. S., 606.
Barbier vs. Connolly, 113 U. S., 27.
Manigault vs. Springs, U. S. dec. 4, 1905

The defendant contends that the above cases decide that this "Mill Act" now under consideration does not contravene the provisions of the 14th Amendment of

the Constitution of the United States, and that in effect they determine that this "Mill Act" (Public Statutes, chapter 190) is consonant with said amendment.

The defendant claims that Head vs. Amoskeag Mfg. Co., *supra*, in terms decides that this Massachusetts statute is in accord with the 14th Amendment. The references repeatedly made in the opinion in the above case to the Massachusetts Mill Act, and to the various decisions thereunder and thereupon, with emphatic approval, sustain this claim.

The assertion in this opinion, contained, that the New Hampshire Act was "for the most part copied from the Massachusetts Act authorizing the owners of mills to flow lands of others paying damages assessed by a jury" is proof positive of the conclusiveness of this contention.

The decision in Head vs. Amoskeag Mfg. Co., 113 U. S., 9-26, was cited with approval in Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, in Wurts vs. Hoagland, 114 U. S., 606, and in Barbier vs. Connolly, 113 U. S., 27, and the principles therein declared have been reaffirmed in other cases which may be cited later in this brief.

As the defendant understands these cases just hereinbefore cited, they determine that such an act as this at present under consideration is valid, as a reasonable exercise of the power of the legislature having regard to the public good, as well as the rights of land owners along an unnavigable stream, to regulate the use of the water power of such stream, and that such exercise of legislative power is not required to be upheld as a taking by the delegation of the right of eminent domain of private property for public use in the constitutional sense, but rather upon the ground before stated, that such a statute "regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with due regard to the interests of all, and to the public good, is within the constitutional power of the legislature."

Head vs. Amoskeag Mfg. Co., 113 U. S., 9.

This was a writ of error to reverse a judgment of the Supreme Court of the State of New Hampshire, against the plaintiff in error, upon a petition filed by the defendant in error, for the assessment of damages for the flowing of his land by its mill-dam under the general Mill Act of that State.

Head objected that the statute was unconstitutional and that the petition could not be maintained because they contemplated the taking of his property for private use in violation of the 14th Amendment of the Constitution of the United States. His objections were overruled by the highest court of New Hampshire.

The proceedings in the state court were had under the general Mill Act of New Hampshire which provided that any person or any corporation authorized by its charter so to do, may erect or maintain on his or its own land a water mill and mill-dam, upon any stream not navigable, paying to the owners of land flowed the damages which upon a petition filed in court by either party, may be assessed by a committee or by a jury, for the flowing of the lands to the depth and extent to which they may or can be flowed by the dam.

Mr. Justice Gray delivered the opinion of the court from which we quote certain extracts:

> "General Mill Acts exist in a great majority of the states of the Union. Such acts, authorizing lands to be taken or flowed *in invitum*, for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware and North Carolina, as well as in Massachusetts, New Hampshire and Rhode Island, before the Declaration of Independence; and exist at this day in each of these states, except Maryland, where they were repealed in 1832. One passed in North Carolina in 1777 has remained upon the statute book of Tennessee. They were enacted in Maine, Kentucky, Missouri and Arkansas, soon after their admission into the Union. They were

passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama and Florida, while they were yet territories, and re-enacted after they became states. They were also enacted in Pennsylvania in 1803, in Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia and Georgia, but were afterwards repealed in Georgia."

"In most of those states, their validity has been assumed, without dispute; and they were never adjudged to be invalid anywhere until since 1870, and then in three states only, and for incompatibility with their respective constitutions." (The three states are Georgia, Vermont and Michigan.)

"The principal objects, no doubt, of the earlier acts were grist mills; and it has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist mill which grinds for all comers, at tolls fixed by law, is for a public use."

"But the statutes of many states are not so limited, either in terms, or in the usage under them. In Massachusetts, for more than half a century, the Mill Acts have been extended to mills for any manufacturing purpose. Manufacturing Co. vs. Upham, 5 Pick., 292; Palmer Co. vs. Ferrill, 17 Pick., 58, 65; Stat. 1824, chap. 153. And throughout New England as well as in Pennsylvania, Virginia, North Carolina, Kentucky and many of the Western States, the statutes are equally comprehensive.

"It has been held in many cases of high authority, that Special Acts of incorporation, granted by the Legislature for the establishment of dams to increase and improve the water power of rivers and navigable waters, for mechanical and manufacturing purposes, are for a public

use. Scudder vs. Trenton Delaware Falls Co., Saxt., 694, 728, 729; Mill Corporation vs. Newman, 12 Pick., 467; Hazen vs. Essex Co. 12 Cush., 475; Commonwealth vs. Essex Co., 13 Gray, 239, 251, 252; Hankins vs. Lawrence, 8 Blackford, 266; Mfg. Co. vs. Fernald, 47 N. H., 444.

"In some of those cases, the authority conferred by General Mill Acts upon any owner of land upon a stream to erect and maintain a mill on his own land and to flow the land of others, for manufacturing purposes, has been considered as resting on the right of eminent domain, by reason of the advantages inuring to the public from the improvement of water power and the promotion of manufactures. See also, Holyoke Co. vs. Lyman, 15 Wall., 500, 506, 507; Beekman vs. R. R. Co., 3 Paige, 45, 73; Talbot vs. Hudson, 16 Gray, 417, 426. And the validity of General Mill Acts, when directly controverted, has often been upheld upon that ground, confirmed by long usage or prior decisions." (He then cites several opinions to this effect.)

* * * * "The statute now in question, the first general Mill Act passed by the Legislature of the State, was passed and took effect on July 3, 1868; was held in Ash vs. Cummings, 50 N. H., 591, after elaborate argument against it, to be constitutional." (Citing several cases.)

* * * * "The question whether the erection and maintenance of mills for manufacturing purposes under a general Mill Act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it.

We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the Legislature."

The opinion then goes on to speak of the compulsory partition of common interests in lands and that in many states if the estate is such that it cannot be divided it is either set off to one and he is ordered to compensate the others in money, or else the whole estate is ordered to be sold. It suggests that water rights may be the subject of partition in equity either by apportioning the time and extent of use or sale of the right and a division of the proceeds, and that one joint owner or tenant in common of house or mill may compel the other to sustain a portion of the burden of repair and maintenance.

Continuing the learned justice says:

> "The statutes which have long existed in many states, authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have Commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property." (Citing numerous cases.)
>
> * * * * "But none of the cases, thus put by way of illustration, so strongly call for the interposition of the law as the case before us.
>
> "The right to the use of running water is *publici juris*, and common to all the proprie-

tors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the Mill Acts, therefore, it was often impossible for a riparian proprietor to use the water power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public: and to substitute, for the common law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury."

* * * * "Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other states, maintaining the validity of general Mill Acts as taking private property for public use, in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid as a just and reasonable exercise of the power of the Legislature, having

regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without some such regulation could not be beneficially used. The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of Pumpelly vs. Green Bay Co., 13 Wall., 166.

"Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the 14th Amendment of the Constitution of the United States. Walker vs. Sauvinet, 92 U. S., 90; Davidson vs. N. O., 96 U. S., 97; Hurtado vs. Cal., 110 U. S., 516; Hagar vs. Reclamation District, 111 U. S., 701."

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, 154, 162.

This case was an appeal from a judgment of the Circuit Court of the U. S. for the Southern District of California, in an action brought to procure an injunction restraining the Collector of the Irrigation District from giving a deed of certain land on a sale by the Collector for the non-payment of an assessment under an act incorporating the Irrigation District, and to set aside such assessment upon the ground that the Irrigation Act of California was an infraction of the 14th Amendment of the Constitution of the United States.

The Court, through Mr. Justice Peckham, say in the opinion:

"The form in which the question comes before the court in this case is by appeal from a de-

cree of the United States Circuit Court for the southern district of California, perpetually enjoining the collector of the irrigation district from executing a deed conveying the land of the plaintiff * * under a sale made of such land pursuant to the provisions of the Act under consideration.

"The grounds upon which relief was sought were that the Act was in violation of the Federal Constitution and also of the Constitution of the state of California. The decree is based upon the sole ground that the Act violates the Federal Constitution in that it in substance authorizes the taking of the land of the appellee 'without due process of law.' Coming before the Court in this way, *we are not confined in our review of the decision of the lower court within the same limits that we would be if the case were here on error from the judgment of a state court.*"

* * * * "The case does not essentially differ from that of Hagar vs. Reclamation Dist. No. 108, 111 U. S., 701, where this Court held that the power of the legislature of California to prescribe a system for reclaiming swamp lands was not inconsistent with any provision of the Federal Constitution.

"The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the state, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as *reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. Head vs. Amoskeag Mfg. Co., 113 U. S., 9, 22; Wurts vs. Hoagland, 114 U. S., 606, 611; Cooley, Taxn., 2d Ed., p. 617.*

"If it be essential or material to the prosperity of the community, and if the improvement be one in which all the land owners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. *In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.*"

Wurts vs. Hoagland, 114 U. S., 606.

This was a case in error to the Supreme Court of the State of New Jersey in which the plaintiffs in error sought to reverse a judgment confirming an assessment of commissioners for the drainage of land under the statute of New Jersey of March 8th, 1871.

Mr. Justice Gray in delivering the opinion of the court and quoting from the opinion in Coster vs. Tide Water Co., 3 C. E., Green 68-71, said:

"And to effect this object, the Acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; farther it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested, and for all other purposes the title of the land remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of leg-

islative power, and may well be considered as included in the grant of legislative power in the Constitution."

After citing a series of drainage cases the learned justice proceeds to say:

> "This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and lowlands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the Legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this Court upheld the validity of general Mill Acts in Head vs. Amoskeag Manufacturing Co., 113 U. S., 9."

Barbier vs. Connolly, 113 U. S., 27.

Mr. Justice Field who delivered the opinion of the court in the course thereof said:

> "But neither the [14th] Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase

the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good."

In passing it may also be suggested, that there are statutory restrictions on rights and privileges which may redound to the benefit of the public, and yet not constitute a taking by a delegation of the right of eminent domain, ~~or by the so-called police power of a state.~~

The defendant contends, as already suggested, that the Massachusetts "Mill Act" comes within such class.

E.

Constitution of Massachusetts, Part First, Article X.

* * * * "But no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

Constitution of Massachusetts, Part the Second, Chapter 1, Section 1.

> "And further, full power and authority are hereby given and granted to the said general court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof. * * * *"

In brief the defendants contend that, although this Massachusetts "Mill Act" might well be declared valid and the erection and maintenance of a dam by virtue thereof and the consequent flowage upheld as an exercise of the right of eminent domain, yet it ought to be and has in effect been held by this Court not to be in violation of the 14th Amendment of the Constitution of the United States upon the broader and more logical reason that it is peculiarly within the province of the legislature of a state to enact laws that shall tend to the increase of its industries, the development of its resources and in general to the additions to its property.

It makes no difference if such legislation causes or may cause special burdens to or interference with the property or common law rights of an individual or individuals so long as public interests are conserved.

Before the Mill Acts one riparian owner could not erect a dam that should set the water back upon his neighbor's land without that neighbor's consent, and therefore manufacturing industries did not to any considerable extent exist, and thus it became necessary for the welfare of the State that there should be the enactment of such legislation as should give to the riparian proprietor who began occupation of his mill site

as such first, and who proceeded with reasonable despatch thereafter to develop power by the erection of a dam, the right or privilege to flow back upon the land or structure of his neighbor above on the same stream, the water thus ponded, the lower proprietor paying to the upper proprietor for any injuries so occasioned either such a gross sum or such annual damages as should be adequate compensation.

Not only were the primary objects of such legislation successfully accomplished, but also the secondary purpose, that of the prevention of a multiplicity of vexatious controversies and litigation.

F.

No title to the land flowed is acquired by a lower proprietor under this Mill Act, and no land is taken thereby.

It is true that under this "Mill Act" the land owner cannot obtain damages for an alleged restriction on the use of his land by the contemplated raising of the water thereon or thereover, until the flowage caused by the raising of the waters of the stream by the dam of the lower proprietor actually takes place.

It is also true that the owner of the mill-dam does not by proceeding under the "Mill Act" acquire any title to the land flowed, but only the *mere right* to raise the water by his dam, and that the owner of the land thereby flowed cannot draw off by canals, aqueducts or ditches the water, which has been raised by the dam of the lower proprietor.

It is also true that before the water is raised by the dam of the lower proprietor, the upper proprietor may dike, embank or dig canals on his own land.

These propositions are supported by the following cases:

Williams vs. Nelson, 23 Pick., 141.
Murdock vs. Stickney, 8 Cush., 113.
Storm vs. Manchaug Co. et al., 13 Allen, 10.
Manigault vs. Springs, U. S. Dec. 4, 1905
Hurtado vs. Hoagland, 114 U. S. 606
Barbier vs. Connolly, 113 U. S. 27

Paine vs. Woods, 108 Mass., 160.
Lowell vs. Boston, 111 Mass., 454.
Isele vs. Arlington etc. Bank, 135 Mass., 142.
Kenison vs. Arlington, 144 Mass., 456.
Turner vs. Nye, 154 Mass., 579.
Hazen vs. Essex Co., 12 Cush., 475.
Head vs. Amoskeag Mfg. Co., 113 U. S., 9.
Otis Co. vs. Ludlow Mfg. Co. et al., 186 Mass., 89.

That is, the upper proprietor, being the owner in fee of the land afterwards flowed, had the right to use such land until actually flowed, for any such useful purpose as he saw fit, and to derive therefrom such income or profit as such land was capable of returning. He also had the right before the water was raised by the lower owner's dam to dike, embank, dig canals or erect barriers upon his own land that would prevent or limit the set back of water on his own land. If he chose to take advantage of none of the means of prevention or limitation within his power before the raising by the dam of the waters of the stream, his only recourse for relief or compensation, one or both, was the provisions of the "Mill Act" which the defendant contends and will later argue were constitutionally ample.

The title to the real estate still remained in the upper proprietor of which he could divest himself by deed that should carry with it to his grantee in the event that the land was flowed by the waters ponded by the dam of the lower proprietor, such rights as then inured or might thereafter inure under the act, against the dam owner, for instance, such as under § 3 of c. 190, the restriction and regulation by a verdict of a jury of the height to which the water might be raised; and under § 17 of the same chapter, the lowering or opening of the dam by verdict of a jury, and under § 18 by annual damages accruing since the delivery of the deed that may have been theretofore awarded, and under

§ 30 for increase of compensation. The instances might be further multiplied.

The upper land owner, of course, in the event of the legal abandonment of his mill site by the lower riparian proprietor would have full use of the land theretofore flowed by the dam, and the right to dispose of it as to him might seem best.

The plaintiff in error while the defendant's dam was in process of construction, and previous to the raising of the waters thereby, availed itself of the right conferred by some of the authorities just hereinbefore cited, to erect and did erect a stone embankment or barrier (its own dam) thus fixing a boundary, beyond which the waters when raised by the defendant's dam could not flow.

G.

The plaintiff was entitled to no notice of the acts of the defendant which it did not receive.

It is evidently the purpose of the plaintiff under its 15th, 16th, 17th, 18th, and 19th assignments of error to contend that there was a taking of the property and rights of the plaintiff in contravention of the 14th Amendment, without due process of law in that no notice of such taking was given to it by the defendant.

Plaintiff's claim under these assignments may be briefly stated as follows:

(15) Due process of law under the 14th Amendment requires that the act of appropriation be clear and intelligible.

(16) The occupation of the Red Bridge site under the authority of the statute was so ambiguous and unintelligible that no appropriation of water power or property of the plaintiff was indicated, and, therefore, there was no such appropriation.

(17) The commencement of occupation of the Red Bridge site under the authority of said statute was so

ambiguous and unintelligible that no appropriation of water power or property of the plaintiff was indicated, and, therefore, there was no such appropriation.

(18 and 19) The construction of the tail race of the defendant on August 3, 1899 under the authority of said statute was so ambiguous and unintelligible that no appropriation of water power or property of the plaintiff was indicated, and, therefore, there was no such appropriation.

The plaintiff's position, however, as thus stated appears to be *not that there was no notice of the appropriation*, but that the *notice was so ambiguous and unintelligible as not to indicate the extent of such appropriation* of plaintiff's water power and property.

Neither in its pleadings nor by objections or exceptions to the Master's report did the petitioner raise the question of insufficiency of notice, but it is first suggested in the assignments of error. The question was, therefore, raised too late to receive the consideration of this Court. Moreover, the determination of this issue, if material, was surely for the State Court and does not involve a Federal question.

However, for purposes of argument, enlarging the scope of the assignments of error noted above (15, 16, 17, 18 & 19) so as to give the plaintiff the full benefit of its contention, now presented, with reference to notice, the following suggestions naturally arise:

If it be the contention of the plaintiff that before doing any of the acts necessary to constitute an appropriation of water power, as pointed out in the many decisions upon the subject, actual notice of such intention and of the scope and extent of the proposed work should be given by the appropriator to any person whose property will be affected, of what advantage would such notice be to the latter?

Certainly not to enable him to prevent the appropriation, because that result would be to nullify the act itself.

An upper proprietor receiving such notice would immediately with an assumption of good faith commence the development of his privilege and by the erection of an inexpensive saw mill or grist mill thereby compel the lower proprietor to abandon his enterprise or submit to extortionate demands.

Notice which could not be thus availed of would be a mere empty form, and hence the omission of such requirement in the act does not amount to any practical hardship to the upper proprietor. In other words, it would be impracticable.

Even under statutes permitting takings by right of eminent domain prior notice is not required.

The Legislatures of Massachusetts and other states have repeatedly passed acts permitting municipalities to take lands and water rights for the purpose of establishing or enlarging their water supplies containing no requirement for prior notice, but providing that within a prescribed period after such taking there shall be filed in some designated place of record a description of the property taken sufficiently accurate for identification.

Cases involving such acts have again and again been before the courts, but no such act has ever been held unconstitutional because of its failure to provide for notice before the taking.

In passing upon other similar acts involving the taking of or interference with private property, the Supreme Court of Massachusetts has repeatedly held prior notice to be unnecessary.

See Allen vs. Charlestown, 111 Mass., 123, 124.
Holt vs. City Council of Somerville, 127 Mass., 408, 410.
Gately vs. Old Colony R. R. Co., 171 Mass., 494.
Appleton vs. Newton, 178 Mass., 277, 281.
Lancy vs. Boston, 185 Mass., 219, 221.

Such a statute (Mass. Stat. 1867. c. 308) was by this Court in Sweet vs. Rechel, 159 U. S., 380, in an opinion by Mr. Justice Harlan held to be constitutional.

If then, applying this principle to the appropriation of water power, an upper proprietor has notice at any stage of the proceedings his rights are fully protected.

Spencer vs. Merchant, 125 U. S., 345.

C. B. & Q. R. R. Co. vs. Nebraska, 170 U. S., 57.

Cincinnati N. O. & T. P. R. R. Co. vs. Kentucky, 115 U. S., 321.

The plaintiff, however, in fact received notice of the acts and intentions of the defendant both (a) constructive and (b) actual.

(a) Constructive Notice.

March 30, 1900 defendant filed with the County Commissioners plans and specifications of its proposed dam (Record p. 65) as required by P. S. c. 190 § 52, which provides:

> "No reservoir, reservoir-dam, or mill-dam shall be constructed or materially altered, until plans and specifications of the proposed work have been filed with and approved by the county commissioners of the county where it is to be done. Said commissioners shall retain and record such plans and specifications, and shall inspect the work during its progress; and if at any time it appears that the plans and specifications are not faithfully adhered to, they may appoint an inspector to be constantly engaged at the expense of the owners in the supervision of the work; and upon a refusal of the owners or of their agents to adhere to said plans and specifications, said inspector may order the discontinuance of the work: *provided* however, that nothing contained in this and the six following sections shall apply to small dams, constructed for irrigation or for other purposes, the breaking of which would involve no risk to life or property."

It must be assumed that the plaintiff in error had knowledge of this section and also of the Acts of 1897 c. 439 , §§ 1, 7 (R. L. c. 35 §§ 5, 17), the material portions of which are as follows:

> Section 1. "The words 'public records' when used in this or any other act shall, unless manifestly inconsistent with the context, be construed to mean any written or printed book or paper, or any map or plan of the Commonwealth or of any county, city or town in or on which any record or entry has been or is to be made in pursuance of any requirement of law, or any written or printed book or paper, or any map or plan which any officer or employee of the Commonwealth or of any county, city or town is required by law to receive, or in pursuance of any such requirement has received for filing, * * "
>
> Section 7 of this Act provides: "Every person having the custody of any public records shall on request for any public record in his custody furnish the same for inspection and examination under his direction, supervision and care, or under the direction, supervision and care of some person designated by him, and shall on request for a copy of any public record in his custody, and the payment of a reasonable fee, furnish such copy; provided, however, that the inspection and furnishing of copies of the public records of a city or town shall be subject to the reasonable ordinances of the city or by-laws of the town."

In Bailey vs. Miltenberger, 31 Pa. St. 37, the plaintiff sued for breach of a covenant of warranty contained in a deed of real estate in the city of Pittsburg. Nearly eight years before the date of the plaintiff's purchase the legislature had authorized the city to lay out and open a street and wharf over the land in question; and nearly five years before the date of the purchase, the city had exercised that authority by passing the necessary ordinances and causing plans to be

made out and filed in the offices of the proper public officials, and by taking other steps proper to that end. Subsequently to the plaintiff's purchase the street was opened through the land and the plaintiff contended that the title of the defendant, his grantor, had been divested by the act of the legislature, and that this constituted a breach of the covenant of warranty. The judge of the lower court instructed the jury thus:

> "If * * * notice to the purchaser were at all necessary, he undoubtedly had constructive notice of all the material facts connected with the authority and acts of the city in relation to this street and wharf. He was bound to know the Act of 31st. of March, 1836, and all the ordinances duly passed by the councils of the city, and recorded under and in pursuance of that act, as well as the plans of the street and wharf made and filed according to its provisions, and how they affected the property he was about to purchase."

The Supreme Court affirmed the correctness of the instruction.

It may be argued that the purpose of section 52 is merely to provide for the safety of dams and thereby to afford protection to the public, but even though that may be the primary object, the section is to be found in the same chapter as are the other provisions which relate to the present controversy and must be said to be a part of the Mill Act of the Commonwealth.

Except as above the statute does not require any notice to be given by one owner to another of such owner's intention to occupy his mill site, or to erect a dam which may flow back upon the land of the other, nor does the statute require after the commencement of such occupation by one owner any notice to the other of that fact or of the extent of flow which may be caused by the dam in process of erection. No decision under the Mill Acts intimates that any notice is necessary

in order to render effective such occupation or the commencement thereof.

Head vs. Amoskeag Mfg. Co., 113 U. S., 9.

(b) Actual Notice.

The Otis Company knew in the fall of 1899, that the Ludlow Manufacturing Company were engaged in the work preparatory and necessary for the erection of a dam upon the site of the Red Bridge dam. (Record pp. 63, 64.)

From the fall of 1899 the work which was being done by the Ludlow Manufacturing Company at the site of its dam could be plainly seen by a person passing along on the highway, and said work was at all times from August, 1899, visible from the railroad track (Record p. 64).

The directors of the Boston & Albany Railroad Company and of the Ludlow Manufacturing Company had consulted at the site of the dam with reference to the change of location of the track, which change was subsequently made (Record pp. 37, 38).

Bliss, Fabyan & Company were the authorized agents and managers of the plaintiff. Their knowledge was the knowledge of the plaintiff and notice to them or to Mr. Olsen of that firm was notice to the plaintiff (Record p. 64).

The engineer of the plaintiff, evidently on the watch, on April 3, 1900, wrote to the plaintiff's superintendent the following letter the contents of which, clearly indicating to one familiar with the situation that the dam of the defendant would flow land of the Otis Company and deprive it of a portion of its fall of 19.65 feet at its alleged lower privilege, were communicated to said Olsen April 4, 1900.

Springfield, Mass., April 3, 1900.

Mr. R. C. Newell,
Three Rivers, Mass.

Dear Sir:— You may have heard that the Ludlow Co. has submitted plans and specifications of its *proposed new dam at Red Bridge*

to the county commissioners for their approval. I saw the plans this afternoon and they call for a dam 48 feet high above extreme low water, or some 33 feet above the railroad at the site of the dam.

Yours truly,
J. K. Barker.

When the county commissioners approve the plans of the Ludlow Co. will this complete the appropriation of the power?

(Exhibit 161, Record p. 63.)

That the situation was fully appreciated appears from the correspondence between Newell and Bliss, Fabyan & Co. which followed (Exhibits 163, 162 & 164, Record pp. 70, 71), from which these extracts may be noted.

"Another point that would also seem to be well to ascertain from Mr. Gardner would be if it would not answer every purpose to preserve our privilege if we were to put in *a dam only 5 or 6 feet high* and establish *a saw mill or any other cheaply constructed mill*, so that we could limit the amount of expense there to a minimum sum until such time as we saw fit to enlarge our dam and privilege for the transmission of electricity or other purposes.

"It seems to the writer that our main purpose at the present time should be to preserve our privilege at the smallest expense possible, and then having done so whether that would not establish our rights for all time to put up any structure and dam of any size we saw fit, so as to develop the water power to its fullest extent, if we should sometime wish to do so." (Exhibit 163.)

"The erection and maintenance of a *saw mill, or any other 'mill' of cheap construction* with a low dam just sufficient to afford necessary power

for operation would preserve our rights." (Exhibit 162.)

"In reference to the building of a dam at Three Rivers on the Otis Company's privilege, we are all unanimously of the opinion that something should be done to preserve our rights, and that a timber dam should be started as soon as possible, somewhat in accordance with the suggestions made of a dam 6 or 10 feet high, so as to get it in at the earliest possible moment with the least delay and expense." (Exhibit 164.)

Thus it appears that the determination made by the plaintiff on April 4, 1900, to erect a dam did not comprehend the dam subsequently erected by it, but was for the purpose of preventing the appropriation by the defendant under its prior determination which the plaintiff then knew had been made (Record p. 73.)

And it is further established that no determination of the plaintiff upon April 4, 1900, to erect a dam was arrived at until after notice of the Ludlow Manufacturing Company's determination and commencement to erect a dam which would flood the plaintiff's dam and alleged mill site to the extent to which they are flooded by the present dam of the Ludlow Manufacturing Company (Record p. 73.)

Having actually received notice of the acts of appropriation of the defendant the plaintiff is not entitled to relief, by reason of the fact that the Mill Act may not in terms contain a provision requiring notice.

Tyler vs. Judges of Registration, 179 U. S., 405.

C. B. & Q. R. R. Co. vs. Nebraska, 170 U. S., 57.

Reetz vs. Michigan, 188 U. S., 505

Detroit etc. Railway vs. Osborn, 189 U. S., 383.

Notice is a local question.
Castillo vs. Mc. Conico, 168 U.S. 674.

H.

This "Mill Act" accords to this plaintiff in error constitutional compensation for damages sustained by it.

"Compensation" is the term employed in the "Mill Act."

It is significantly the same term used in the Massachusetts Declaration of Rights. (Constitution of Massachusetts, Part First, Article X.)

The word "compensation" is ample in scope and broad in meaning. No stronger word could be thought of in this connection. It means that which constitutes or is regarded as an equivalent; that which makes good something lost, that which compensates for deprivation. It means remuneration, recompense.

Now the Public Statutes, chapter 190, § 4 (Revised Laws, chap. 196, § 4) provide as follows:

> "A person, whose land is overflowed or otherwise injured by such dam, may obtain *compensation* therefor upon his complaint before the superior court for the county where the land or any part thereof lies, * * * * *"*

Section 3 provides that "The height to which the water may be raised, and the length of time, or period, for which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury."

Then follow the provisions as to what such complaint shall contain, where the same shall be filed, how and where served, and the pleadings that shall follow, et cetera.

The Act contemplates a trial by jury.

Under the Act § 17, a jury "shall decide how much, if any, the dam shall be lowered."

> Section 18 provides that the jury shall "ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant,

would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid."

Section 22 provides that the person entitled to receive the annual compensation, or gross damages, shall have a lien therefor from the date of his complaint on the mill, mill-dam and land, and that the lien shall comprehend any sum due within three years before the commencement of the action.

Section 23 provides that an action may be maintained against any person who owns or occupies the mill when the action is brought, and that in such action recovery may be had for the whole sum due and unpaid for three years then last past, whoever has owned or occupied the mill during that time.

Section 24 provides for the satisfaction of the lien.

Section 30 provides that if the upper proprietor is dissatisfied with the annual compensation rendered by a jury, he may bring a new complaint for an increase of such compensation, or for ascertaining the gross amount of the damages.

Section 31 provides that such new complaint may be maintained by and against either of the parties to the original suit or by and against a person lawfully holding under either of them.

It is difficult to conceive of a more comprehensive protection to the rights of an upper riparian proprietor than is provided for by this Act. In every manner and form he is safeguarded and shielded.

The highest court of Massachusetts in language unmistakable have said in this very case, as follows:

"It is enough to say that in our opinion the provision for compensation for damages is ade-

quate to meet such constitutional requirements as are applicable to a statute of this kind. Even in cases arising under statutes which authorize an exercise of the right of eminent domain, it has been held that similar provisions are sufficient to satisfy the language of the Constitution."

Otis Co. vs. Ludlow Mfg. Co. et al., 186 Mass., 89, 95. (Record p. 116.)

Head vs. Amoskeag Mfg. Co. 113 U.S. 9
Manigault vs. Springs 199 U.S. Dec. 4, 1905
Madisonville vs. Lake Erie & W. R.R. 196 U.S. 162

I.

The principles and elements of damage are not open for consideration in this case.

The only question before this Court is whether the plaintiff in error has been deprived of its property without due process of law contrary to the provisions of the 14th Amendment of the Constitution of the United States.

There is no requirement in this proceeding for a construction or interpretation of what elements of damage are comprehended by the phrase "reasonable compensation" used in this "Mill Act".

It is enough to say that it is the constitutional term and to the state court should be relegated at least in the first instance, when the occasion shall arise, the privilege of determining what elements shall be considered in arriving at the "reasonable compensation" which this plaintiff in error is entitled to or may in the future be entitled to by reason of the raising of the waters of the stream by the lower riparian proprietor, the Ludlow Manufacturing Company.

This plaintiff within the statutory limits has filed against this defendant a complaint under § 4 of the Act, for compensation on account of the erection and maintenance of the dam in question. That complaint is now pending in the Massachusetts Courts.

When there shall have been a ruling in that action by the highest state court on the question of what elements

of damage are comprehended by the constitutional and statutory term "compensation," then if ever and not till then can there be occasion or opportunity for this Court to pass upon the question as to whether there has been deprivation of or invasion of or interference with the plaintiff's common law rights by virtue of this statute without "reasonable compensation therefor."

In this case the Supreme Judicial Court of Massachusetts have said:

> "It is unnecessary to determine, in this case, what constitutional rights one has, in reference to damages for an interference under statutory authority with his right at common law to use the water of a stream without obstruction, where such interference is permitted in the regulation of the rights of different owners, as necessary to an advantageous use of the power; nor is it important now to decide what principles will hereafter be applied in assessing the damages of the present plaintiff in view of existing conditions."
>
> Otis Co. vs. Ludlow Mfg. Co. et al., 186 Mass., 89, 93. (Record p. 116.)

In effect the Court say that when occasion shall arise upon the complaint of this plaintiff under the "Mill Act" it will decide what principles and elements of damage are comprehended by the words "reasonable compensation."

J.

Due Process of Law.

In view of the foregoing suggestions and citations, the defendants contend that the plaintiff has not been deprived of its property without due process of law.

It has had its day in the Courts of Massachusetts, and a full and fair hearing therein; it has appealed to the "Mill Act" of that State for a remedy for an alleged wrong, and there were such procedings as were

appropriate to the nature of the case. It has claimed that that Act should have a particular and peculiar construction in its favor.

The highest court of Massachusetts has construed the act to which the plaintiff has appealed for relief, contrary to the interpretation which the plaintiff desired. That court followed the clear and repeated decisions of the highest court of the State for seventy-five years, which has repeatedly announced the object and the purpose of the statute. It bore carefully in mind the fact that reasonable compensation was provided for restriction upon the use of land caused by water set back by a statutory dam.

The plaintiff being dissatisfied with the construction given by the court to the statute to which it appealed for protection, arrives in this court with the alleged grievance that its property has been taken away without due process of law.

The defendant claims that the plaintiff has had the process of law due according to the law of the land and therefore "due process of law."

Marchant vs. Pennsylvania R. Co., 153 U. S., 380, 385.
Davidson vs. New Orleans, 96 U. S., 97.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, 157, 158.
Walker vs. Sauvinet, 92 U. S., 90.
Kennard vs. Morgan, 92 U. S., 480.

As was said by this Court in Marchant vs. Pennsylvania R. Co., 153 U. S., 380, 385, so might well be said here:

> "It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in 'due process of law.'
>
> "The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself.

> In those courts her rights were measured, not by law made to effect her individually, but by general provisions of law applicable to all those in like condition."

In the case of Davidson vs. New Orleans, 96 U. S., 97, 104, this court say through Mr. Justice Miller.

> "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or *such proceeding in regard to the property as is appropriate to the nature of the case*, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.
>
> "It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, * * * * * * * * .
> But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the

> State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

The plaintiff may place reliance upon Pumpelly vs. Green Bay Co., 13 Wall., 166. That case is readily differentiated from the present for the reasons pointed out in Head vs. Amoskeag Manufacturing Co., supra.

K.

A decision that as between riparian proprietors priority of occupation gives the better right is not contrary to the 14th Amendment of the Constitution of the United States.

The question of fact that was decided in favor of the defendant cannot be reviewed by this Court.

> Backus vs. Ft. Street Union Depot Co., 169 U. S., 557, 566.

The defendant further asserts that the construction which the highest court of Massachusetts gave to the statute, which in effect was that priority of occupation gave the first right, is for the reasons previously stated and upon authorities previously cited, not now open to question.

But if peradventure such construction can now be taken into consideration, its correctness would seem almost indisputable in view of the reasoning thereupon contained in the opinion of the Massachusetts Supreme Judicial Court in this case to be found on pp. 114, 115 of the Transcript of Record, and of the history and objects of the "Mill Acts" which are considered in (B) and (C) of section II of this brief.

L.

The construction that the act applies as well to upper as to lower owner is not unconstitutional.

While the defendant claims that the above construction cannot now be questioned, it at the same time contends that such interpretation does no violence to the 14th Amendment.

If the contrary construction should be had the reasons for and objects of the "Mill Act" would be nullified.

A logical and reasonable construction of chapter 190, Public Statutes of Massachusetts, is that after a lower proprietor at great expense has commenced the development of water power and the construction of his dam and mill, in the exercise of the right given him by statute, and is continuing the same to completion with reasonable despatch, an upper proprietor, who, up to such commencement had not utilized his common law right to develop a fall of water upon his own land, shall not then be permitted to step in and neutralize the efforts of the lower proprietor by commencing and carrying to hurried completion, a cheap dam of his own and therby transform such lower proprietor's large expenditure from a profitable investment into an utter loss.

The plaintiff's interpretation of the statute instead of decreasing controversies would increase them, and tend to unsafety of dams and peril of human life and property, by inducing and promoting races between proprietors for swift construction and completion of their respective dams. Under the interpretation of the plaintiff a lower proprietor might begin and proceed with the erection of a structure that would endure for a century and that would when complete give large results, both to himself and to the community; and when he had incurred an expenditure of a million dollars, and had brought his dam within a week or a day of completion, see his efforts wasted, his expendi-

tures come to naught, and himself financially ruined by an adjacent upper proprietor who had within that week or day thrown across the stream above a cheap log dam.

In connection with and in support of (K) and (L) the following authorities are respectfully submitted:

Bigelow et al. vs. Newell, 10 Pick., 348.
Washburn's Treatise on the American Law of Easements and Servitudes (4th Ed.) chapter 3 § 5, paragraph 19.
Storm vs. Manchaug Co. et al., 13 Allen, 10.
Dean vs. Colt et al., 99 Mass., 486.
Miller et al. vs. Troost et al., 14 Minn., 365.
Kelly vs. Natoma Water Co., 6 Cal., 105.
Kimball et al., vs. Gearheart et al., 12 Cal., 27.
Parke vs. Kilham, 8 Cal., 77.
Ortman et al., vs. Dixon, 13 Cal., 33.
Ophir Silver Mining Co. vs. Carpenter, 4 Nev., 534.
Irwin vs. Straitt, 18 Nev., 436.
New England Hospital vs. Boston, 113 Mass., 518.
Trinity Church vs. Boston, 118 Mass., 164.
Otis Company vs. Ludlow Mfg. Co., *supra.*

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ADDITIONAL POINTS

In Support of Defendant's Argument.

No Federal question was properly called to the attention of the State Court by the plaintiff.

The only request made by the plaintiff which by any possibility raises a Federal question is its second request (Record, p. 76), which is as follows:

> "That if said section 2 does authorize the owner of such lower mill site to flow and injure an upper mill site, under the circumstances stated in the last-stated request, then said section is in violation of the Constitution of the United States and of the Constitution of Massachusetts."

This request does not raise any Federal q tion for the following reasons:

1. It does not specify in what way the Constitution is violated.

2. It does not state what part of the Constitution is violated.

3. It does not deny the constitutionality of the entire statute, but only a certain section thereof.

It is also to be noted that nothing is said in this second request which raises the question that the Mill Act is void because its provisions as to notice are inadequate or that its provisions for compensation are insufficient, and no claim is made therein with reference to taking private property for private uses.

The plaintiff objected to the master's report because the master did not make certain rulings.

With the exception of the 18th objection (Record, p. 83), which related to its second request, the plaintiff did not ob-

ject to the rulings made by the master, but founds its objections upon the fact that the master did not make certain rulings which were not requested by it. Therefore its objections can be availed of only so far as they are based upon the refusal of the master to give the rulings requested or upon other actual rulings made by the master.

After the filing of the master's report in the case the plaintiff filed certain exceptions.

These exceptions can be taken advantage of by the plaintiff only so far as they were based upon objections made before the master and appearing in the record.

Referring to these exceptions by their respective numbers (Record, pp. 91–94), it will be seen that—

1 to 5, inclusive, are based on findings of fact.

6 does not raise any Federal question.

7 is too general and does not specify wherein the due process of law clause of the 14th Amendment is violated.

8 to 17, inclusive, raise no Federal question.

18 is founded upon the failure of the master to give the second request asked for, which has already been referred to.

19 to 33, inclusive, raise no Federal question but those which were either questions of fact or purely local.

The only exceptions which can be said to relate to any constitutional question are the 7th and 18th, and the latter is the only one which is based upon any prior request or objection, and neither of them properly specify wherein the Constitution of the United States is violated.

No justification can be found in the record for the plaintiff's 10th, 11th, 12th, 13th, 14th, and 21st assignments of error (Record, pp. 106, 107) with reference to alleged inadequacy of statutory provision for just compensation, because the only objection with respect to compensation was in the plaintiff's 8th objection (Record, p. 82), which in substance alleges that if a riparian proprietor, by beginning the occupation of his land or the commencement of a dam thereon, shall acquire the right thereafter to flow lands of an upper proprietor "such provision is contrary to the *fifth*

amendment of the Constitution of the United States and void, in that it authorizes the taking of private property without just compensation."

And the only exception in which the attention of the court was called to the question of compensation is the plaintiff's 8th exception (Record, p. 92), which relates to the fifth amendment.

The question of compensation was nowhere and at no time called to the attention of the State Court except as comprehended in the objection and exception which relate to said fifth amendment.

Neither can the plaintiff prevail under its 15th, 16th, 17th, 18th, and 19th assignments.

These refer to the character of the taking and allege that it was uncertain and ambiguous.

The plaintiff made no prior request, objection, or exception upon which these assignments can be founded.

It is submitted that the plaintiff cannot now claim that the statute in question is unconstitutional because there is no provision therein requiring notice to be given to a riparian proprietor before his land is flowed, for the reason that the plaintiff makes no such claim in any of its assignments of error, or in any of its requests to the master, or in any of its objections or exceptions to his report.

For the same reason the plaintiff cannot claim that chapter 190 of the Public Statutes of Massachusetts violates the 14th Amendment because it authorizes the taking of private property for private purposes.

> "The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and actual use of the water within a reasonable time" (Record, p. 114).

The right of a lower proprietor is inchoate, and no right to flow lands of an upper proprietor is gained by the lower proprietor after beginning his appropriation or occupation

and commencement of his dam, unless the same be "*followed by a completion of the work and the actual use of the water within a reasonable time.*" If he fails to complete his dam and within a reasonable time to flow lands of the upper proprietor, he obtains no right as against the latter. Right to flow is gained when the dam shall have been completed and the flowing thereby has taken place, and not before.

No Federal question is involved in this aspect of the case but merely one of fact for the State Court.

No real estate vests in the lower proprietor at any time, but from the time of flowing there is simply an interference with the upper proprietor's use thereof.

Manigault *vs.* Springs, U. S., Dec. 4, 1905.

Plaintiff may contend that the master correctly ruled that plans filed by the defendant March 30, 1900, were not notice to the plaintiff of defendant's intention to build its dam.

If the master so ruled and if the question becomes material, such ruling was erroneous as a matter of law for the reasons previously stated in this brief (pp. 62, 63).

This ruling of the master was duly excepted to by the defendant (5th exception, Record, p. 95).

The question was not passed upon by the State Court, but if the ruling was wrong it can be corrected by this Court.

The plaintiff may also contend that Mass. P. S., c. 190, violates the due process of law clause of the 14th Amendment because it failed to provide payment in advance of damages, or to sufficiently provide security for the same, and may quote the language of State and Federal courts contained in certain cases in support of this contention, such as *Cherokee Nation vs. Southern Kansas Ry. Co.*, 135 U. S., 641; *Williams vs. Parker*, 188 U. S. 491; *Norwood vs. Baker*, 172 U. S., 269, 277; *Att'y Gen'l vs. Old Colony Ry.*, 160 Mass., 62, 90; *Ash vs. Cummings*, 50 N. H., 591; *Conn. River R. R. vs. County Commissioners*, 127 Mass., 50.

Most of the above cases were the result of special acts of legislation, the provisions of which required either the payment of money into court for compensation or for security

for interference with or taking of property prior to such interference or taking, or else provided that compensation should be paid from the uncertain earnings of a railroad, and do not support the contention suggested above.

Cherokee Nation *vs.* Southern Kansas Ry. Co. (*supra*) arose under act of Congress of July 4, 1884 (St. 73, c. 179), which conferred the right to construct a railroad through the plaintiff's lands, and specially provided that before the defendant could enter upon the lands of the plaintiff it must deposit an amount double the award of commissioners, to be made *after* their award.

Williams *vs.* Parker (*supra*) arose under a statute of Massachusetts providing that no building shall be erected above a certain height, and that any person interested in a building in course of construction may recover damages within two years against the city of Boston. In this statute there was no provision for advance payment of or security for damages, and the statute was held to be constitutional.

The court says in this case, in substance, that no question was raised as to the general solvency of the city of Boston, and that the question of solvency does not seem material.

Att'y Gen'l *vs.* Old Colony Ry. (*supra*) involved the interchangeable mileage act of Massachusetts, and in holding the act unconstitutional the court based its opinion upon the fact that there could be no restoration to a railroad of money which might have been taken by another railroad, but which really belonged to the former, in case of the latter railroad's insolvency.

Ash *vs.* Cummings (*supra*) arose under the mill act of New Hampshire, the material sections of which are as follows:

> SEC. 1. Any person or any corporation authorized by its charter so to do may erect and maintain on his or its own land or upon land of another, with his consent, a water mill and dam to raise the water for working it, or for creating a reservoir of water, and for equalizing the flow of the same for its use and of mills below, upon and across any stream not naviga-

ble, upon the terms and conditions and subject to the regulations hereinafter expressed.

Section 2 provides that if any person's land shall be overflowed by use of such dam and if said damage or injury within thirty days after due notice thereof shall not be satisfactorily adjusted by the party erecting or maintaining the dam, either party may apply by petition to the Supreme Court to have damages that may have been or may be done assessed, and after reasonable notice to all interested parties the court shall refer the petition to a committee of three disinterested persons to determine in relation to the matter set forth therein.

SEC. 3. The committee shall hear the parties and view the premises, and if they shall decide that the dam causing the flowing is of public utility or benefit, and that the same is necessary for use of the mill for which it is designed they shall estimate damages and report to the court. The court may inquire for itself whether the erection of the dam is of public benefit. If the report shall be accepted the court shall render judgment thereon, which judgment shall be final and execution may issue.

SEC. 4. No person or corporation shall derive any title from said proceedings or be discharged from any liability in relation to said premises until he or it has paid or tendered to the person aggrieved or damaged the amount of such adverse judgment.

This act provided for the flowing of lands by waters impounded by the dam of a lower proprietor *without notice* and *without an opportunity to an upper proprietor to be heard prior to such flowing*. The court sustains the constitutionality of the act, but suggests that upon application by an owner of land flowed the court might order a deposit of money or other security for compensation for damages, and if such order was complied with the court would refuse an injunction. This suggestion was not because of language in the statute which gave authority therefor, but because of the general equity powers vested in the court.

In Conn. River R. R. *vs.* County Commissioners (*supra*) the court held a special act unconstitutional because no person or corporation, or the State, or the manager of the railroad was made liable for damages, but the person or estate damaged was compelled to look for reimbursement to the possible earnings of the road.

There was no provision for securing damages that might be awarded, nor for notice until after the taking in the following cases:

Warren *vs.* Spencer Water Co., 143 Mass., 9.
Hamer *vs.* Bar Harbor Water Co., 78 Maine, 127.
Gloucester Water Supply Co. *vs.* Gloucester, 179 Mass., 365.
Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., 394.

And it is to be remembered that the notices required after the takings in the above cases were by statutes providing for the filing in the registry of deeds or some designated place of record a description of the lands taken.

In the case at bar there is no allegation in the plaintiff's bill of complaint of pecuniary irresponsibility of the defendant, or that the value of the property of the defendant upon which, under this mill act, the plaintiff could have a lien for damages is insufficient for satisfaction thereof, nor is there a prayer in the plaintiff's bill requesting a deposit of money or other security for the damages which the plaintiff might suffer by reason of the flowing back upon its land of the waters raised by the defendant's dam.

Had there been such allegation or prayer the court, under its general equity jurisdiction (P. S., c. 151, sec. 4), if satisfied of the truth of the allegation or the necessity for a deposit of money or the giving of other security, might in its discretion have so ordered.

Ash *vs.* Cummings, 50 N. H., 591.
Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., 394.
Manigault *vs.* Springs, U. S., Dec. 4, 1905.

Moreover, the defendant contends that the plaintiff could choose to pursue one of two courses under the Mill Act of Massachusetts. It could elect to take its damages under

the statute or to dike, trench, or erect an embankment or barrier upon its own land to prevent the same from being flowed by the defendant's dam.

Manigault *vs* Springs (*supra*).

In various acts of legislation other than the mill acts in various States, granting rights and privileges to individuals or private corporations, there are to be found substantially similar provisions as are contained in this Mill Act, and no provision for the deposit of a fund or for other security in advance of actual taking or interference. The constitutionality of such acts has been repeatedly upheld by this Court.

Sections 18–27 of the Massachusetts Mill Act (P. S., c. 190) are in accord with the constitution as providing sufficiently for compensation.

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